

1150 . d . 14  
1-2

---

**REFLECTIONS**  
ON THE  
**DISTINCTION USUALLY ADOPTED**  
IN CRIMINAL PROSECUTIONS  
FOR  
**LIBEL:**  
*&c. &c.*

---

---

# REFLECTIONS

ON THE

DISTINCTION USUALLY MADE  
IN CRIMINAL INVESTIGATIONS

FOR

# LITTLE:

©. 1860.

---

REFLECTIONS  
ON THE  
DISTINCTION USUALLY ADOPTED  
IN CRIMINAL PROSECUTIONS  
FOR  
LIBEL;  
AND ON  
THE METHOD,  
*LATELY INTRODUCED,*  
OF  
PRONOUNCING VERDICTS  
IN CONSEQUENCE OF SUCH DISTINCTION.

---

By A. HIGHMORE, Jun.  
ATTORNEY AT LAW. 

---

LONDON:  
PRINTED BY T. FARNWORTH,  
FOR J. JOHNSON, ST. PAUL'S CHURCH YARD,  
M DCC XCI.

REGIONS

BY J. R. GREEN

THE HISTORY OF THE  
UNITED KINGDOM  
IN EIGHT VOLUMES

LIBEL

40

6. 25.

134



## APOLOGY.

---

---

PROFESSIONAL avocations, and the necessity of calling the public attention at the moment while it is occupied on any subject, must plead in my behalf for the haste with which the following pages have been put together: I send them forth, trembling for their reception, yet trusting them to public candor; a little more time might have enabled me to digest them better, and to have collected additional arguments; but they will not be without their use, nor their Author without his reward, if they cause an increased attention to the subject, or a deeper investigation of its real truth and importance.

Bury Court, St. Mary Axe,  
20th April 1791.

A. H. jun.

*12*

HISTORICAL

By the same Author.

A DIGEST of the DOCTRINE of  
BAIL.

Printed for T. Cadell, Strand.

Price 4*s.*

—

AND

A Succinct VIEW of the HISTORY of  
MORTMAIN,

And the STATUTES, &c. relative to CHARI-  
TABLE USES, as they affect PUBLIC  
CHARITIES.

Printed for T. Whieldon, Fleet Street.

Price 4*s.*

12. II. A

12. M. 3. 1. C. 1. 1.  
12. M. 3. 1. C. 1. 1.

level est frust miscrobie etiam vel inservit vel  
unifundat huius auctoritatem et considerat aliis  
etiamque non leviter et non modo sicut  
est hoc patens non videtur esse adiutorum

## REFLECTIONS,

&c. &c.

In eis scimus ut i' st'v' n'f' - ambo et so  
ciant' t'nt' n'f' m'nt' b'nt' s'nt' n'f'

**I**N an age replete with enlightened knowledge, when every branch of science spreads its benign influence on the mind, and every advantage of experience, and the most impartial examination of the writings and opinions of former ages, are combining their irresistible power to emancipate mankind from the slavery of prejudice and the bigotry of dogmatical error; it is not surprising that doctrines which have tended to aggrandise the assumptions of power by increasing the dependence of the people, should at last have found opponents hardy enough to risk the efforts of reform, and to attempt to draw aside the veil that has so long concealed the truth from public view.

The spirit of improvement, urged on by the keen impression of national grievance, has, in  
the

the present day more especially, burst the cloud which indolence, or rather a blind submission, had drawn over the natural and indefeasible rights of man: Truth is now irradiating all the habitable globe with new and unforeseen splendor, and while her influence awakens other nations from their slumbers, it rouses the torpor of England, and renders her alive to the justice of her claims.—But were I to indulge the astonishment and admiration which the transactions of the present era constantly excite within me, my mind would be led too far from the subject to which I have to entreat the patience and candor of my readers.

The design attempted in the following pages will be to shew, and that from the words of the Record itself, that the Jury are bound to judge in cases of indictment for Libel, without the reservation which has been made of the Law from the Fact: and that there is not any cause for the distinction so arduously pressed upon Juries, who are fully competent to decide upon the whole of the charge in issue before them, in this as in other cases.

The only distinction which I conceive is necessary to be made on the subject of Libels, is that which arises from the private wrong and the

the public injury sustained : by the former, an individual suffers in his fame and credit ; by the latter, the public welfare is also endangered, by the probability that the Libel may excite the passions and rouse the revenge of the person libelled, to acts which may break the peace of society ; or by raising commotions and seditions in the state, by abetting and fomenting the turbulence of restless minds to acts detrimental to the good order and well-being of the government.

As to the first, the injured party has his remedy by civil action for damages, stating his cause of complaint, and the *peculiar damage* he has *sustained* thereby ; or he has the choice of a public prosecution for the possible breach of the peace, whether it has been actually broken or not.

In the civil action the defendant is, by the just practice of the Courts, entitled to plead his justification, by alledging the truth of the facts which he has written or published, and shewing that the plaintiff has not thereby received any injury ; as, mere scurrility and opprobrious words, which do not import, nor are in fact attended with, any injurious effects, will not support this action.

The declaration states something written or published, to be a *false Libel*; and therefore if the defendant pleads in justification and proves the truth of what he published, &c. the Libel can no longer be found to be *false*, and the Jury must of necessity find for the defendant: as in an action for calling a tradesman, Bankrupt, if the defendant justify by his plea, and support his justification by evidence proving the bankruptcy, the plaintiff must fail.

On the other hand, if no proof to substantiate such justification is offered to the Jury, they must recur to the evidence of the plaintiff's injury, and assess what damages they think he has sustained, so as to repair, as much as in their consciences they think possible or right, the loss or injury stated.

Here the Judges have no other or superior jurisdiction than they have in all other civil cases; they may order a new trial, or investigate points of regularity or legal precision in arrest of judgment, on motions made for either of those purposes.

But in criminal prosecutions for this injury, private or public, a distinction has been set up, tending to sever the rights of Juries in the full investigation of the *whole of the charge* before

before them; 1st, as to the fact; 2d, as to the law or criminality:—here a just tenacity has arisen in the minds of men against the further admission and propagation of such a doctrine or practice, which divests them of so much of their duty and right in their juridical capacity, and deposits them in the breast of the Court.

Hence it is that malicious persons may be induced to prefer the process of information or indictment to their private remedy by civil action; because the civil magistrate will be bound to punish whatever act tends to produce a breach of the peace; and because the prosecutor runs no risk of the defendant's justification, as the law admits not of any justification of a public offence: here arises the doctrine, that the more true the Libel be, the more cognizable by justice, because it may be the more aggravating to the party, and produce a greater feud.

Thus it is obvious that the prosecutor may doubtless enjoy a greater share of revenge for his injury, by seeing the punishment inflicted by the Court with more rigidness than could have been expected from a verdict of damages; for the Judges have a discretionary power to add corporal punishment or deprivation of liberty, to pecuniary fine.

This brings me to the examination of that part of the subject which now so much affects and interests most ranks of the community; namely, what power Juries have in examining the charge, and pronouncing their verdict, on informations or indictments for Libel.

The establishment and impression of the distinction referred to, equally injurious to the rights as they are insulting to the common understandings of men, have nevertheless long prevailed, and have been so interwoven in almost all the pleadings of the Bar in these cases, that the imaginations of the Jurors have been entangled in a labyrinth of technical difficulty, from which it has not been possible thoroughly to extricate them: They have endeavoured however, as far as these impressions would suffer them, to throw off the net; but they have themselves fallen into the distinction between the mere act of making or publishing, and the legal criminality; and in order, if possible, to restrict the hands of the civil magistrate from inflicting a punishment for that which they have not deemed to be within his power, they have met with a greater difficulty in framing their verdict; because the matter of fact and the criminality are blended together in the charge,

charge, although the exertions of legal ingenuity at the Bar have endeavoured to separate them in the argument; but adopting the distinction for this lenient purpose, they have for a moment joined the Lawyers on their own ground, in breaking the connection of the charge, by declaring the defendant " guilty of " publishing *only*;" though it is equally questionable whether, by so doing, they have acquitted themselves of their duty, or have answered the purpose they designed: but inasmuch as they have done this with a view to testify their abhorrence of the danger involved in the distinction promulgated by prerogative Lawyers, they have done well, and deserve the applause of their country; but it can only be deemed a leading step towards further elucidation, which may clear the Law from the aspersion which this distinction has cast upon it; namely, that it may, by means thereof, be rendered pliable to the uses of either prejudice, party, or fear!

In cases of sedition, the words of the Indictment, as stated at length by Dr. Burn, in his Justice of the Peace, vol. 3. are these:

INDICTMENT FOR A SEDITIOUS LIBEL.

*The Jurors for our Lord the King upon their oath present, That A. O. late of —, not having God*

*God before his eyes, but moved by the instigation of  
the devil, and falsely and maliciously contriving and  
intending to bring our said Lord the King into ba-  
tered and infamy amongst his subjects, and to move  
sedition among the subjects of our said Lord the King,  
did, on the —— day of ——, with force and  
arms, at —— aforesaid, in the county aforesaid,  
falsely, seditiously, and maliciously write and publish;  
and cause to be written and published, a certain  
false, seditious, and scandalous Libel, entitled —— ;  
in which said Libel are contained, among other  
things, divers false, seditious, scandalous, and ma-  
licious matters, according to the tenor following, to  
wit: ——. And in another part of the same  
Libel are contained divers other false, seditious,  
scandalous, and malicious matters, according to the  
tenor following, ——, to the evil example of all  
others in the like case offending, and against the  
peace of our said Lord the King, his crown and  
dignity.*

Now by this Record the Grand Jury are  
stated to have judged of all the branches that  
compose both the Fact, and, as it is called,  
the Law of the Libel—both as to its falsehood,  
sedition, scandal, and malice, as also to its  
writing and publication: they state different  
parts of the writing in question, denominating  
it a Libel, and present it to the Court under  
all

all these epithets, declaring the evil example, and subjoining their determination, that “ the same was against the peace, &c. ;” which alone justifies the interposition of the Court.

Libels are not written only for the reading of Courts or Barristers ; perhaps if they were, the number of their editions would be considerably smaller ; but for the promulgation of opinions to the world, to men of all ranks and capacities. They are often conceived in language in which men are accustomed to converse—in terms used in their familiar associations with one another ; often cautiously interwoven by their pastors in religious instruction ; and scattered by innumerable methods into their more minute and attractive habits of either acting, thinking, or living ; dispersed in easy conversations ; and often in the cheerful acquiescence with expressions of a florid and animating effect, during the gay circulation of the convivial glass.—

Shall it be asserted that men who read or hear slander or sedition disseminated in any or either of these ways, are incompetent to judge of it in all its extent ? shall it be asserted that they understand at one moment and not at another ? and shall we dare to avow that what a man well comprehended, and perhaps applauded

ed

ed or reprobated as libellous, at the time he heard it, was at the moment he entered upon his capacity as a Juryman to judge of it, so altered, that he must needs leave it to higher capacities to decide? Can it be asserted with any shadow of decency, or reasonable compliment to the abilities of our fellow-countrymen, that the moment they are called upon by their country to declare their opinion, a cloud of stupidity or apathy oppresses their minds, and envelopes the vigor and perspicacity with which they judged of the matter in question before? I speak now of the possibility of a man being sworn on a Jury to try the libellous tendency of a writing or speech he had already heard or read; of which he must then be equally able to judge without the imputation of supposing that he could, after having taken his oath, decide from any other evidence than that which is then laid before him.

Every plaintiff or prosecutor must prove his declaration or charge. Thus the indictment for a Libel states the fact of writing and publishing a seditious Libel, adding the words of the author. This indictment is read to the Jury by the Clerk of the Court, in order to possess their minds of the crime alledged: but why possess their minds at all of the crime, if they

they cannot or are not allowed to judge whether it be criminal? Either they are as fully competent to judge of the criminality of it in Court as at home, or they are ideots, and unfit to be included in the pannel. If it must be assumed *a priori* that the book be a Libel, and that to fix the writer or publisher with just punishment, it must be proved to and found by a Jury that he was the author or publisher, then would there be no need of such a form of indictment: the issue for the Jury would be only, Whether the defendant wrote or published such a book? which is the issue lately attempted to be put upon these indictments, but which include a charge of criminality also.

Surely the evil use or example, which constitutes the chief criminality, is not a more difficult point to judge of, than that of robbery, or murder, or forgery. Particularly in the latter case, the charge is for "uttering a bill, " knowing it to be forged, &c." No man has ever presumed here to set up a like distinction. To utter a bill is no crime, it is a customary act of trade; but that act becomes criminal by the knowledge of its falsehood; and then the act assumes a new name, comprehending both under the word "forgery :" of all which comprehensive view of the charge the Jury have a

**C** competent

competent skill to decide, and have never been interrupted by any of the mazes of technical confusion.

" It is ridiculous," says Mr. Hawkins, " that a writing which is understood by the meanest capacity, cannot be understood by a Jury." This learned writer no doubt had his reasons for not enlarging on a subject which would have involved him in a series of controversy; but if we may judge from the above quotation, his sentiments might at this day have added strength to the minds and resolutions of Jurymen to maintain their right, as firmly, as they have always maintained their integrity, inviolable.

Mr. Bowles (who has addressed the Public upon this subject with all the ready ingenuity of a special pleader, and with that nice discrimination of all the points of his argument, which proves his professional talents) has stated with infinite pains, in the opening of his " Considerations on the respective Rights of Judge and Jury, particularly upon Trials for Life," the immense difficulties under which a Jury would labor, if it had been originally constituted to be their office to decide as well on matters of law as of fact. But these difficulties, which are chiefly rested upon the im-  
possi-

possibility of their judging of that which it is the labor of the lives of the most enlightened men to attain, a knowledge of the laws of their country, do not seem to apply with any force to a case in which no point of law appears to arise. Mr. Bowles skilfully presses these difficulties upon the reader, before he assumes his main subject, and draws from him a confession that, in points of law, Jurymen are incompetent to decide; but granting this preliminary, the Juryman loses no ground, until it be shewn that cases of libel are cases of legal difficulty.

The maxim on which Mr. B. rests the chief jet of this part of his argument, viz. "*Ad quaestionem juris non respondent Juratores, ad quaestionem facti non respondent Judices,*" is certainly irrelevant to the point in issue with the Public, when we consider the method of proceeding, and the words of the Indictment itself, as already stated at length.

It must also be granted to Mr. Bowles, that "nothing but the truth of facts can be proved by the evidence of witnesses" (p. 8.); and if the Jury are sworn to "give a true verdict according to the evidence," it is to the evidence laid before them that their verdict must be confined. But Mr. B. goes on to state what

that evidence is, and the nature of it; and he asserts that "the whole extent of their obligation is to extract, as well as they can, the real facts of the case from the depositions of the witnesses." But Mr. B. ought to consider that it is not oral testimony alone, which Juries are called to examine; they are often led to judge from written testimony, which is far more certain, and less liable to distortion, ambiguity, or perversion. In cases of Libel a charge is made of either slander or sedition, and it is that charge to which the Jury are referred by the Indictment, which it is as inmuch their obligation to listen to, as to the oral testimony of witnesses: it is to that charge, and to the malignancy of it, that they are referred by the plaintiff or prosecutor; and it is the magnitude of that malignancy which has been the original cause of their being appealed to, and the cause why they are to decide of its criminality before the hands of justice can fall upon the offender. Justice never presumed to assume a right of vengeance, without the previous adjudication of the country, without the unambiguous and uninfluenced award of men, of like passions with the offender, who have a like feeling for his faults, and whose verdict cannot be just, without their applying the *whole* evidence and the *whole charge* together.

The

The original and undoubted system of the constitution was, that the evidence should fix upon the offender the fact of writing and publishing, and any other matter that can tend to elucidate and confirm the charge, so as to leave a sufficient ground with the Jury to judge of the criminality of the charge. I must deny the issue to be merely, whether the defendant wrote or published; for that could not be a criminal issue, and never could have been a part of the employment of criminal courts; it would have been a civil issue sent down to a Jury at nisi prius: and though it is the province of the Judges to dispense the law, yet it is their duty to see that all the matters in issue are laid clearly before the Jury, and not parcelled into nice distinctions by the Bar, or separated by technical reservations of the subject matter, so as to endanger the infraction of their oath.

Special verdicts, which, it is granted, admit facts only, certainly do not apply to cases of Libel; for upon those facts some point of *real law*, beyond the capacity or power of the Jury to decide, arises, and compels them to leave their verdict in the hands of the Court: but it is to be considered that every man in this country (how imperfect soever may be, and certainly is, the method of publishing the laws that

that are made—a matter which requires much examination and reform) is supposed to know all the laws in being, and can never be suffered to plead ignorance of any, when perhaps the want of a *proper* publication of the law has inadvertently thrown him into the hands of harpies who live like vultures upon the havoc that is daily made by penal statutes. The same man is told, as soon as he is sworn to try the criminality of a Libel, which if he can read he can understand, that he is incompetent to judge of that criminality, but must absurdly use the word “guilty,” and so criminate a fellow-countryman of the bare act of publishing.

Whatever may be the difficulties to which the doctrine might extend, still it is certainly very questionable, and must appear so to a mind as quick at distinction and logical inference as that of Mr. Bowles, whether, if men are by the constitution supposed to know all the law, that by any reasoning they can be rendered ignorant of common sense when they come to be Jurors in cases of Libel. This, if established, would not be any insult upon the Judges, because they would still, as chairmen of the Court, see that the Jury acted right according to law, and they would find themselves precisely in the same state as they now do in other criminal cases, namely,

to

to pronounce the sentence prescribed by the law, after the Jury have declared the fact, with the criminality of the charge, to be made clear.

Besides, in this state of capacity, Jurors must be excused for the presumption they have sometimes exerted, in absolutely contradicting Mr. B.'s obligation, and with somewhat less scruple "refusing to receive the law as the Judge has "stated it."

In common issues, their verdict is not only declaratory but judicial;—where they give damages in addition to the facts found, often without any direction from the Judge; here they are to be allowed the privilege of judging for themselves in both points; and by the constitution the Judge is bound to receive the verdict, and nothing remains to be done but to register that verdict, and allow the costs of suit: and unless new matter arises, or some error or point of law not adverted to at the trial can be made the means of an appeal to the judicial order of the Court, this verdict of the Jury is final. But be that as it may, it may be asserted that no verdict of any Jury, such as is here stated, and which occurs every day at Nisi Prius, was ever set aside, for combining the simple facts in evidence with their own judgment,

ment, and taking upon it this judicial assessment of damages.

Thus in cases of Libel the Jury must combine the evidence together, and apply it to the charge before them, before they can pronounce, in the terms of the verdict, whether the defendant is *guilty or not*: and if on coupling the one with the other, they do not think him guilty of that which is scandalous, malicious, or seditious, their oath obliges them to acquit.

Where the indictment is preferred against the publisher of a news-paper, or of a pamphlet, on the title-page of which his name is printed; he seldom suggests the thought, in his defence, of denying the publishing only; but relies on denying the malice with which the indictment charges him:—of this the Jury are certainly competent judges, and they form their minds upon the charge with the evidence they receive, as well for the defence as for the complaint.

In the late case of the indictment against the publisher of the *World*, for a Libel on the memory of the late Earl Cowper—Lord Kenyon said, “ Let the publication be made, whether “ soon or late after the death of the party, if it “ be done with a malevolent purpose, to vilify “ the memory of the deceased, and with a

“ view

" view to injure his posterity, then it comes  
 " within the rule stated by Hawkins" [viz.  
 the direct tendency of Libels to a breach of the  
 public peace, by provoking the parties injured,  
 and their friends and families, to acts of re-  
 venge, &c.] ; " then it is done with a design  
 " to break the peace, and then it becomes ille-  
 " gal. But on that question the Jury ought to  
 " have had the power to deliberate. We are  
 " therefore of opinion, that as nothing of that  
 " sort was stated in the prefatory part of this  
 " indictment, as, that it was published with an  
 " intent to create any ill blood, or to throw  
 " any scandal on the family and posterity of  
 " Lord Cowper, or to induce them to break  
 " the peace in vindicating the honor of the fa-  
 " mily, this judgment should be arrested."

If the Jury ought to judge of the degree of malevolence in one case, the rule must be general; and though the doctrine is, that the law implies a malevolence in the fact, there are many facts, as the mere printing and publishing, that admit of no criminality; of this we find the Jury ought to decide: they cannot therefore, by the word *only*, confine themselves to this bare fact. Besides, if they mean to clear the defendant from any criminality, they are not warranted in the use of the word *guilty*; for there is no guilt in the bare act of publish-

ing a book ; they are bound to say whether he is or is not guilty of the charge; for no indictment lies, or could come before them, for publishing a book ; it is for publishing a *false, seditious, and scandalous Libel*; and of that libellous publication he is or is not guilty.

But Mr. Bowles pledges himself (p. 21.) to prove that the “ issue of Libels is only an “ issue of fact;” and that (p. 22.) “ the ques-“ tions of fact and criminality are separated, “ and cannot be confounded together.”

I hope it has already been sufficiently suggested that this imagined separation cannot take place in the human mind. Mr. B. draws some analogy, by way of elucidation, between this case of Libel, and that of murder or burglary. “ The object of the trial is to ascertain whether “ facts can be proved to justify such a charge;” and upon these facts alone the Jury decide. But Mr. Bowles must allow that when the Jury decide that the prisoner is guilty or not guilty, they mean to say that they have heard all the evidence, and thereupon they adjudge that he had or had not such a design as charged, and which design was or was not felonious. They cannot make the nice distinction Mr. B. states; and they know that by their verdict alone, and not by the knowledge of law in the Judge, the

*ability to assess damages on a prisoner*

prisoner at the Bar must be acquitted or suffer death.

And here I must beg leave, with all humble submission, to take exception to Mr. B.'s statement of the indictment of Libels, which, he says (p. 24.), " intimates that the facts stated " are alledged to amount to a Libel ; and that " the Record being thus construed, two dis- " tinct propositions are contained in it—that " the defendant did publish, in such a manner, " the writing stated ; and that the writing so " published is a Libel. The first is purely a " proposition of fact ; and the other, of law." By turning back to p. 13. the reader will see whether this representation is just. If words can be understood, and divested of technical ingenuity they certainly may be the better understood, I must beg leave to deny the whole construction of Mr. B.'s interpretation. One plain and obvious charge is specified, and only one, that the defendant " did falsely, sedi- " tiouly, and maliciously write and publish, " or cause to be written and published, a cer- " tain false, seditious, and scandalous Libel," &c. This renders the general plea of " not " guilty" good, and certainly puts the whole, and not any part of the charge, in issue ; for if the charge were divisible into two proposi-

tions of fact and law, requiring a double plex, as our Author suggests (p. 25.), the defence must be double, and the defendant having been tried on one issue, must again be brought to trial or argument upon the second; which would be preposterous, and repugnant to the laws of England.

If Juries are not to judge comprehensively of the whole of a charge in all its parts, by what rule of exception is it, that they ever judge in cases of nuisance upon civil actions—where having taken a view of the premises as described in the pleadings, they take upon them to adjudge that the thing complained of is a nuisance, and award damages? On the ground of discrimination now attempted to be set up, it should seem in these cases to be only the duty of the Jury to say whether the defendant had built up such a wall, or raised such a flue; and leave it to the Court to determine by the law whether it amounted to a nuisance or not.

Demurrers to indictments for Libels on the point of law, have not been much practised, because the Courts never could, on solemn argument, admit the distinction *a priori*, though they will lean to it after the Jury have exercised their right, given them by the issue: but it will

will now be a matter for the reflection and mature consideration of Courts, how far it will be proper or prudent to separate the rights of Juries, whether it be by demurrer before, or by discrimination after the verdict.

In every action or suit the controversy consists either in fact or in law: if in fact, the Jury, as already stated, are called together to decide; if in law, the points come before the Judges upon demurrer, who assemble to hear what Council can offer on both sides, and then determine what is the law of the case. By demurrer the facts of the case are always admitted, since it refers the law arising thereon to the judgment of the Court; and therefore the fact is taken to be true on such demurrer, or otherwise the Court has no foundation whereon to make any judgment. But it must be remarked that a demurrer in law is never a confession of a thing *against the record*, but only of that which may stand with it; for otherwise the confession would be vain, and would not bind the Court; as in debt upon a bill, the defendant pleaded payment, and the plaintiff demurred, that demurrer was held not to confess the payment, &c. &c.

It is readily granted that these legal distinctions are wise, and tend to prove the excellence of

of the institution of English jurisprudence; but they seem totally irrelevant to the present case, because if they existed in truth upon an indictment for a Libel, the defendant would never risk an appeal to the Court by demurrer, in preference to that to his peers, nor would he be so unwise as to admit among the facts of the charge the malice of the publication, which, though precluded by the forms from justifying in his plea to the indictment, he would always hope to be justified in, by the evidence he meant to adduce in support of his defence. Add to which, that the form of the indictment, as before alledged, makes no such discrimination as represented, and therefore leaves no such point of law for investigation by demurrer.

But to proceed : Mr. B. states, p. 27. " That even though a defendant should plead guilty, he may nevertheless move in arrest of judgment, and urge that the writing was not a Libel :" and on this ground he argues the established distinction between the law and the fact. When a doctrine has been set up by the Courts, it is by no means unnatural that they should admit a practice suitable to such doctrine ; it would have been very inconsistent with that foresight and legal skill which have always distinguished the English lawyers, if, while they  
were

were establishing this distinction with the Jury at the trial, they had been unmindful of all the modes of application to themselves which could be built upon it: but this does not seem to answer the objection, that this charge is not of such a nature as to prevent the Jury from exercising their judgment upon the whole of it collectively; and that no man ought to be harassed with a double investigation.

In almost all issuable pleadings, and more especially in those which relate to criminal law, it has been deemed absurd and superfluous to state matter of law: how comes it, then, that a legal construction shall have been presumed upon the plain simple charge in the indictment above recited, where the practice of pleadings did not warrant any other technical precision, than that which should state the plain and unambiguous fact in issue?

The plea of "not guilty" certainly does contest the whole of the charge: no man, who is indicted for a Libel, and sets about preparing for his defence, can possibly entertain any other idea, than that he means to alledge that he is not guilty of the publishing a scandalous Libel; he never dreams of denying the one half of the charge, that he published; and dropping all allusion to the other half, which denotes the publication to be libellous; and not doubting that

his

his Jury will be as good judges of what he has published as he is himself, he relies upon their verdict to acquit of the whole charge together.

But on the ground Mr. B. assumes, that the fact of writing or publishing is the only matter before the Jury, their duty is degraded to a mere official act of ceremony; very little evidence of this fact being generally sufficient, and any defence being scarcely worthy of their attention: as in cases of Libel against a bookseller for selling an anonymous pamphlet, supposed by the indictment to be seditious; the mere fact of selling is proved in a word by the person who purchased it: when this fact is ascertained, it is the duty of the Jury to consider whether this mere fact comprises in it any degree of guilt, before they can presume to say that the defendant had done a guilty act thereby; they are therefore to take this second evidence from the writing stated in the indictment; which writing it would be needless to read in Court, if the Jury were not to decide upon its tendency: as already remarked.

But it has been suggested to me by a learned and ingenious friend, for whose opinions and attachment I always feel the sincerest respect and affection, that if the Jury are thus to be made the judges of sedition, it may well be feared

feared by the Courts that every seditious libel would go unpunished. To which it must be answered, that he was not aware that in England the people are always made the arbiters of the crimes of one another: every civil claim, all taxation, and every criminal charge, is alike brought to the decision of the people: and thanks be to God! there lives in mankind a sense of right and wrong, that compels them to form the most impartial judgment they can, upon the subjects which their duty to their country calls upon them to decide.

It must be admitted, that, allowing the distinction Mr. Bowles states in these pleadings, the defendant (p. 29.), by not demurring, tacitly admits the libellous effect of the *facts* denied by the plea of Not guilty: but I hope neither my time, nor that of the Reader, which I regard infinitely more, has been spent in vain, in shewing that there is no ground for this distinction, and that it ought without delay to be cleared away from the practice of the Courts of Law.

But let me add that Mr. Bowles far outdoes any of his former reasoning, when he attempts (p. 30.) to set up a qualification for this verdict of Guilty: "It means," says he, "guilty, if those facts amount to a Libel." Now, if

E                      the

the Jury ever have their difficulties, and deliver a qualified verdict, they are sent back to reconsider the matter; for either a qualified verdict leaves too much in the breast of the Court, or it does not determine the matter in issue between the parties: besides, if they have any reservations or qualified sense in their verdict, it cannot justly, according to law or conscience, be deemed "a true verdict," agreeably to their oath: if so, what right has the Court to qualify the verdict for them, and say, or tacitly allow it to be said, " You mean, that " if I the Judge think this book libellous, " you declare the writer guilty of a Libel." This is a point in Mr. B.'s argument, which could never have been expected from the English Bar. The defendant's opportunity of availing himself of this qualification in arrest of judgment, is very satisfactory: he is to be harassed with a trial, which can only lead the way to a long series of legal discussion and insupportable expence, in which his anxiety and his purse are to be exhausted, with little hope of alleviation.

But why is not the same advantage offered to the offender in cases of felony? He may certainly move in arrest of judgment, if he can shew good cause; but that cause will not be on  
the

the distinction here raised; for the Jury have been found competent to decide that he was guilty of a felony whereon his life depended; though in cases of Libel, where only the person, purse, or liberty of the offender are at stake, and where a much more obvious case comes into their review, they are to be adjudged incompetent. Does a prisoner, pleading Not guilty to a charge of felony, admit the felony, and deny the facts only?

The epithets of false, scandalous, wicked, seditious, malicious, are words much more generally understood, than feloniously; and seem to clear the Record from all idea of law. No man ever wrote, or read, sedition, but he knew that it was so: and this, without a tittle more knowledge of law than is amply sufficient to answer all the purposes of his civil capacity as a citizen.

But if we allow, for a moment, that the mischievous intention referred to in the epithets is an inference of law (p. 33.), still this will not prove what Mr. B. premises, that “ the publication of the matter said to be libellous, “ is the crime itself;” nor is “ the crime completely found, when the publication is found, “ supposing that such publication contains a “ Libel:” for we dare not admit the mind so

far as to draw inferences before it is fully professed of the charge; because, as was alledged before, the bare publication involves in it no more criminality, than the bare mounting a horse and travelling the high road; but the *libellous* matter of that publication, like the *felonious* assault of the rider upon the traveller he stops, constitutes the one a Libeller and the other an Highwayman: it would be as ridiculous, as oppressive, to try a man for publishing a book, as to try the other for taking the air; it is the tendency of the one, and the conduct of the other, that is referred by the words of both indictments to the investigation of the Jury, before the one can be adjudged liable by their verdict to the punishment due to his Libel, or the other to that of his felony. Having established the one or the other fact, the inferences contained in the epithets are admissible, but not sooner.

In drawing his arguments to a close, Mr. Bowles (p. 47.) states the question to be,  
 " Whether the defendant did publish the matter said to be libellous? And not, Whether  
 " that matter is libellous? Of course the verdict, which cannot exceed the bounds of the  
 " issue, relates only to facts, like a special verdict in other cases; and the term *guilty im-*  
 " plies

"plies no more, than that the facts charged are true, &c." This is the conclusion he draws from all he has alledged on this part of his subject; and I must beg leave again to take exception to the statement of the question, as varying far from the words of the indictment. There the matter is unequivocally charged to be a scandalous Libel; to fasten upon it the question he has stated, Whether the defendant did publish the matter said to be libellous—is to fasten upon the charge an interpolation which the words of it will not warrant; and for the truth of this I must again intreat the Reader to refer back to p. 13. where the Indictment is fully recited.

Here I must quit Mr. Bowles. If I have anywhere misrepresented his argument, I am unconscious of it. I hope I have not injured the cause for which I have engaged, by any expressions that liberality would condemn; and that I shall be excused for attempting to offer sentiments to the Public, which might come with better garb and more precision from abler pens.

I have endeavoured to divest the foregoing pages of technical language or reference; in order that the hints they contain may invite more general attention; that every citizen may be led to assure himself that, when called upon to decide the fate or the property of his neighbour,

hour, his own good sense and conscious integrity, aided by the same ability which he daily exerts in the conduct of his affairs, are requisites amply sufficient for that purpose; and that the distinction which has thrown so much difficulty in his way in cases of Libel, does not derive its origin from the laws of his country, from the spirit of the English constitution, or from that impartiality which should ever guide all adjudications in Courts of Justice:—but it takes its origin from the deep designs of those who presided in the Court of Star-chamber; many of whom were enemies to themselves and to their country; whose abject servility to the Crown, and whose own personal ambition, interwove upon the noblest institution of human policy and freedom, the Trial by Jury, those doctrines which served at length to level that Court with its deserts. Those doctrines have been gradually wearing away; but while the Law Reporters of those times continue to be read and relied on by the student without caution, we cannot expect their speedy extinction.

If, by any thing advanced in these pages, the least degree of assurance can be given to the mind of any one Juror on the subject in question, so as to enable him, when, according to the best of his abilities, he finds no criminality in

in any publication charged before him as libellous, to acquit the defendant by his general verdict of Not guilty, without any qualified terms, I shall hope to have done some little service to my country. And on this important point no Juryman can hesitate a moment, if he steadfastly suffers this rule to possess his mind, That he is sworn to examine whether the defendant is guilty of a libellous publication; and that there is nothing on the face of the Record which warrants him in yielding to the above subtle distinction, and thus declaring the defendant guilty of the single and inoffensive act of *publishing only.*

THE END.

LIBRARY OF THE  
HARVARD COLLEGE LIBRARIES  
BOSTON MASS.  
THIS BOOK BELONGS TO THE  
HARVARD COLLEGE LIBRARIES  
AND MAY NOT BE LOANED  
OR SOLD.  
THESE BOOKS ARE  
PROTECTED BY LAW  
BY THE HARVARD COLLEGE LIBRARIES  
AND BY THE LIBRARY  
OF THE HARVARD COLLEGE LIBRARIES

